

INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petition No.: 20-001-10-1-4-00002
Petitioner: Ruth E. Chizum, Trustee
Respondent: Elkhart County Assessor
Parcel No.: 20-05-10-176-001.000-001
Assessment Year: 2010¹

The Indiana Board of Tax Review (Board) issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner initiated a 2010 assessment appeal with the Elkhart County Assessor.
2. On August 19, 2013, the Elkhart County Property Tax Assessment Board of Appeals (PTABOA) issued its determination denying the Petitioner any relief.
3. On September 16, 2013, the Petitioner timely filed a Petition for Review of Assessment (Form 131) with the Board. The Petitioner elected the Board's small claims procedures.
4. The Board issued a notice of hearing on February 4, 2014.
5. Administrative Law Judge (ALJ) Patti Kindler held the Board's administrative hearing on April 10, 2014. She did not inspect the property.
6. Certified tax representative Joyce L. Schultz represented the Petitioner. Attorney Beth Hinkle represented the Respondent. Ms. Schultz, Ruth E. Chizum, Timothy D. Medich, Deputy Assessor Gavin Fisher, and County Assessor Cathy Searcy were sworn as witnesses.

Facts

7. The subject property contains over 87 acres of land with improvements, and is mainly used as a commercial drag-racing strip. It is located at 56328 Ash Road, in Osceola.
8. The PTABOA determined the following assessment:

Land: \$855,000 Improvements: \$203,100 Total: \$1,058,100

¹ While Section I of the Form 131 indicates that the assessment year under appeal is 2012, all other evidence and documentation shows that the year of appeal is 2010. The parties agreed that the appeal is for 2010.

9. At the hearing the Petitioner requested a total assessment of \$834,100.²

Record

10. The official record for this matter is made up of the following:

- a) Petition for Review of Assessment (Form 131) with attachments,
- b) A digital recording of the hearing,
- c) Exhibits:³

- Petitioner Exhibit 1: Narrative presented by Petitioner's counsel,
- Petitioner Exhibit 2: Income analysis and federal tax returns,
- Petitioner Exhibit 3: Subject property report card, and photograph of the entrance to the subject property,
- Petitioner Exhibit 4: Sales history for the South Bend Speedway,
- Petitioner Exhibit 5: Property record card for the South Bend Speedway.

Respondent Exhibit A: Property record card, aerial photograph, and front-view photograph of the subject property,

Respondent Exhibit B: Brief detailing the Respondent's legal argument.⁴

Board Exhibit A: Form 131 petition with attachments,

Board Exhibit B: Notice of Hearing dated February 4, 2014,

Board Exhibit C: Hearing sign-in sheet,

Board Exhibit D: Notice of Appearance for Ms. Henkel.

- d) These Findings and Conclusions.

Contentions

11. Summary of the Petitioner's case:

- a) The subject property's assessment is too high in light of its income. The property is commonly known as the Osceola Dragway. According to federal tax returns, the dragway's income declined significantly between 2009 and 2011. The federal tax

² On the Form 131 petition the Petitioner requested a total assessment of \$703,300.

³ At the hearing, Ms. Henkel stated she would not object to Petitioner's exhibits; however, she stated that she had a concern about the weight that should be assigned to them. This could be construed by the Board as a relevancy objection. If the Board were to construe this as a relevancy objection, it would overrule her objection finding it goes to the weight of the evidence rather than its admissibility. In Respondent's Exhibit B, a brief submitted to the Board, Ms. Henkel objects to Petitioner's Exhibit 4 and 5 on hearsay grounds. Ms. Henkel also made reference to these exhibits as hearsay during her argument; however, she did not object to the exhibits when they were offered. The Board will not consider these objections, as the opposing party had no opportunity to respond.

⁴ At the hearing, the Administrative Law Judge marked this Respondent's Exhibit B with the consent of Respondent's counsel.

statements served as a basis for an income-approach valuation developed by Ms. Schultz. *Schultz testimony; Pet'r Ex. 1, 2.*

- b) Utilizing her training as a Level II Indiana Certified Assessor-Appraiser, Ms. Schultz relied solely on allowable income, expenses, and depreciation in developing her income analysis. Originally she averaged out the dragway's 2009-2011 federal tax return figures to minimize any large variances in income and expenses between those years. Eventually, she settled on an average of the 2009 and 2010 figures in completing her analysis. *Schultz testimony; Pet'r Ex. 1, 2.*
- c) In performing her income analysis, Ms. Schultz reported the cost of goods sold in the "supplies" column and depreciated any equipment essential to the operation of the dragway. She did not allow for the replacement of the buildings on site. Further, she used only allowable expenses that were related to the business. Ms. Schultz concluded that the subject property's 2010 assessment should be \$834,100, which represents a rate of return of 4.14%. *Schultz testimony; Pet'r Ex. 1, 2.*
- d) Although the subject property is unique, Ms. Schultz found the sale of the South Bend Speedway to support her opinion that the subject property's assessment is excessive. Ms. Schultz concedes that the sale did not occur until 2011, which is after the assessment date, but it is the only sale of a similar "special-use property" available in the general area. *Schultz testimony; Pet'r Ex. 5.*
- e) Finally, the land assessment is excessive for the following three reasons: First, the EPA has mandated that part of it is to be used for cleanup of a designated superfund site; second, a gravel pit on the site has a negative affect on its value; and lastly, a portion of the land is used for agricultural purposes, such as growing alfalfa. *Schultz, Medich argument; Pet'r Ex. 1.*

12. Summary of the Respondent's case:

- a) The Petitioner failed to offer probative evidence to indicate that the assessment is inaccurate. Instead, the Petitioner relied on an inapplicable income approach, and one unsubstantiated and untimely sale of a property in a neighboring county. *Henkel argument.*
- b) The income approach is inapplicable here because the subject property is not an income producing property in the classic sense. It is not leased to an outside party like apartments or other rental properties. The Petitioner incorrectly used income and expenses related to the dragway business, and therefore actually valued the business rather than the real estate. *Henkel argument, Fisher testimony.*
- c) Whether the dragway business is profitable or not has nothing to do with the value of the property itself. In fact, assessors are required to assess only the value of the real property, measuring the value of property for its use, not the value of its use. *Henkel argument, Fisher testimony (citing Grant Co. Ass'r v. Kerasotes Showplace*

Theatres, LLC, 955 N.E.2d 876, 881, (Ind. Tax Ct. 2011); *Stinson v. Trimas Fasteners Inc*, 923 N.E.2d 496, 501 (Ind. Tax Ct. 2010)).

- d) In any event, the Petitioner’s representative did not show that she used generally recognized appraisal principles in formulating her opinion of value. *Henkel argument* (citing *Inland Steel Co. v. State Bd. of Tax Comm’rs*, 739 N.E. 2d 201, 220 (Ind. Tax Ct. 2000)).
- e) Further, the Petitioner’s income approach includes items that are not allowable expenses, such as the cost of goods sold and the depreciation of the business equipment. Even if it were appropriate to include business expenses, these items do not relate to the real estate. Further, only part of the subject property’s 87.21-acre site is used for the business. The Petitioner did not consider the value of the excess acreage that is not part of the ongoing business. *Fisher testimony*.
- f) Finally, in regards to the land, it is difficult to decipher which of several contiguous parcels the Petitioner claims is being used as agricultural land without evidence confirming that use. The subject property has 20 acres being assessed as primary commercial land, while an additional 50.55 acres of the land is assessed as usable undeveloped land at a substantially lower rate. In addition, a 50% negative influence factor has been applied to account for the portion of the subject property being utilized as a superfund site. *Fisher testimony*.

Burden of Proof

- 13. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass’r*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The burden-shifting statute as recently amended by P.L. 97-2014 creates two exceptions to that rule.
- 14. First, Ind. Code § 6-1.1-15-17.2 “applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year.” Ind. Code § 6-1.1-15-17.2(a). “Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.” Ind. Code § 6-1.1-15-17.2(b).
- 15. Second, Ind. Code § 6-1.1-15-17.2(d) “applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1.15.” Under those circumstances, “if the gross assessed value of the real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township

assessor (if any) making the assessment has the burden of proving that the assessment is correct.” Ind. Code § 6-1.1-15-17.2(d). This change is effective March 25, 2014, and has application to all appeals pending before the Board.

16. These provisions may not apply if there was a change in improvements, zoning, or use, or if the assessment was based on an income capitalization approach. Ind. Code § 6-1.1-15-17.2(c) and (d).
17. Here, the Petitioner did not offer an argument that the burden should shift to the Respondent. Further, the property record card indicates the value did not increase by more than 5% between 2009 and 2010. Thus, the burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden rests with the Petitioner.

Analysis

18. The Petitioner failed to make a prima facie case for reducing the 2010 assessment.
 - a) Indiana assesses real property on the basis of its true tax value, which the Department of Local Government Finance (DLGF) has defined as the market value-in-use. To show a property’s market value-in-use, a party may offer evidence that is consistent with the DLGF’s definition of true tax value. A market-value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice (USPAP) often will be probative. *Kooshtard Property VI v. White River Twp. Ass’r*, 836 N.E.2d 501, 506 n.6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs for the property under appeal, sales information for that property or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
 - b) Regardless of the valuation method used, a party must explain how its evidence relates to market value-in-use as of the relevant valuation date. *See O’Donnell v. Dep’t of Local Gov’t Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *Long v. Wayne Township Ass’r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). The valuation date for a 2010 assessment was March 1, 2010. Ind. Code § 6-1.1-4-4.5(f). Any evidence of value relating to a different date must also have an explanation about how it demonstrates, or is relevant to, that required valuation date. *Long*, 821 N.E.2d at 471.
 - c) Here the Petitioner offered an income-approach analysis in an attempt to prove that the assessment was incorrect. The “income approach-to-value is based on the assumption that potential buyers will pay no more for the subject property...than it would cost them to purchase an equally desirable substitute investment that offers the same return and risk as the subject property.” MANUAL at 14. The income approach focuses on the intrinsic value of the property, not on the Petitioner’s operation of the property because property-specific rents or expenses may reflect elements other than the value of the property “such as quality of management, skill

of work force, competition and the like.” *Thorntown Tel. Co., Inc. v. State Bd. of Tax Comm’rs*, 588 N.E.2d 613, 619 (Ind. Tax Ct. 1992).

- d) In this case, the Petitioner’s income approach fails to value the subject property itself as an investment. Ms. Schultz valued the business enterprise. For example, the income approach utilized revenue derived from the drag-racing business rather than revenue that might be generated from leasing the subject property itself. Similarly, Ms. Schultz used expenses related to the business, rather than those related to the operation of the property. Assessments should reflect the value of the real property alone, and not include, or be substituted with, other economic interests. *Kerasotes Showplace Theatres, LLC*, 955 N.E.2d at 882.
- e) Here, even if the Petitioner had correctly considered property-related, rather than business-related income and expenses, it is necessary to consider income and expense data from other comparable properties in order to make an accurate, realistic projection about the income stream a property can be expected to produce. If the income and expense data for the subject property is not shown to be in step with what market data shows, it does not comply with generally accepted appraisal principles. Failure to establish that the income and expenses of the subject property are in line with those of comparable properties means that any low income or high expenses may be attributed to management or other reasons that are not inherent to the real property itself. *See Lake County Trust Co. No. 1163 v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1253, 1257-58 (Ind. Tax Ct. 1998) (economic obsolescence was not warranted where taxpayer executed unfavorable leases resulting in a failure to realize as much net income from the subject property). The Petitioner did not offer any such proof or analysis.
- f) Similarly, Ms. Shultz failed to support or explain her choice of a 4.14% capitalization rate. A capitalization rate “reflects the annual rate of return necessary to attract investment capital and is influenced by such factors as apparent risk, market attitudes toward future inflation, the prospective rates of return for alternative investments, the rate of return earned by comparable properties in the past, the supply of and demand for mortgage funds, and the availability of tax shelters.” *See Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269, 275 (Ind. Tax Ct. 2005). Ms. Shultz failed to offer any support for the 4.14% capitalization rate other than to say she felt it was “justified” based on the declining local real estate market. Such statements, which are unsupported by probative evidence, are conclusory and of no help to the Board in making its determination. *Whitley Products, Inc. v. State Bd. of Tax Comm’rs*, 704 N.E.2d 1113, 1118 (Ind. Tax Ct. 1998); *Herb v. State Bd. of Tax Comm’rs*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995).
- g) The Petitioner also presented sales information for a property located in St. Joseph County in an attempt to show that the subject property is over-assessed. In order to effectively use the sales comparison approach, however, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property do not constitute

probative evidence of the comparability of the properties. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.* The Petitioner offered none of this type of analysis. Therefore, this purportedly comparable property fails to help prove value on a sales comparison basis.

- h) The Petitioner offered a number of other reasons that the assessment is too high. The land is designated by the EPA as a superfund cleanup site. A portion of the land is a gravel pit. And finally, a portion of the land is used to grow alfalfa. But the Petitioner failed to offer probative evidence on how these factors affect the market value-in-use. It was the taxpayer's duty to walk the Board through every element of the analysis. *See Long* 821 N.E.2d at 471. Without the key step of relating these factors to market value-in-use, the Board can give them no weight.
- i) The Petitioner failed to make a prima facie case.
- j) Therefore, the Respondent's duty to support the assessment with substantial evidence was not triggered. *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

Conclusion

19. The Board finds in favor of the Respondent.

Final Determination

In accordance with the above findings and conclusions, the assessment will not be changed.

ISSUED: July 7, 2014

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days of the date of this notice.

The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.